No. 88-6546

In The

Supreme Court of the United States

October Term, 1988

ALBERT DURO,

Petitioner,

vs.

EDWARD REINA, CHIEF OF POLICE, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SAC AND FOX NATION, KICKAPOO TRIBE OF OKLAHOMA, and HOUSING AUTHORITY OF THE SAC & FOX NATION IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE
INTEREST OF AMICUS CURIAE

The Sac and Fox Nation and Kickapoo Tribe of Oklahoma are federally recognized tribes of Indians located in the State of Oklahoma. Both Tribes have adopted a written Constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, Act of June 26, 1936, ch. 831, § 3, 49 Stat. 1967, codified at 25 U.S.C. § 503, and the Sac and Fox Constitution and Charter incorporate the provisions of the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq.

Pursuant to their Constitutions, the Legislature of the Sac and Fox Nation and Kickapoo Tribe of Oklahoma have enacted a myriad of ordinances which regulate the conduct of both members and non-members within the Indian Country subject to their jurisdictions. Some of those ordinances include a Business Corporation Act, providing for the incorporation and domestication of corporations within the tribal jurisdiction, a Grievance Committee Procedure Act, providing for the Removal or discipline of elected tribal officers, a Bingo Ordinance, providing for the licensing and regulation of bingo activities within the tribal jurisdiction, a Mineral Leasing Act, regulating the execution, operation, and termination of leases of tribal owned minerals including oil and gas, a Secured Transactions Act, providing for the entry and filing of liens upon personal property held within the tribal jurisdiction when such property is subject to a security interest by a lender, a General Revenue and Taxation Act, providing for the levy, administration, and collection of tribal taxes upon such things as tobacco,

sales of personal property, employees's earnings, possessory interests such as leases in tribal or individual trust lands, the severance of oil and gas from Indian lands, the net receipts of licensed bingo operations, and motor vehicles, and comprehensive police, criminal and appellate procedure, and criminal offenses codes. This Tribal legislation applies to all persons and property located within the Indian country subject to the jurisdiction of the Tribes, and regulates the conduct of both Indians and non-Indians alike. Many of these ordinances are enforced by criminal penalties as to member and non-member Indians alike. The vast majority of the Judges of the Court of these Tribes are attorneys who are Indians, but are members of other Tribes resident in Oklahoma. Written Bureau of Indian Affairs records concerning the adjudication by the Sac and Fox of controversies concerning the Nation or its members and non-members can still be found dating from as early as 1853.

In order for the Sac and Fox Nation and Kickapoo Tribe of Oklahoma to continue their social and economic development within the Tribal jurisdictions it is critical that the Tribal Courts be available to adjudicate criminal violations of tribal law which arise between Indian persons coming within the jurisdiction of the Tribes. Many nonmember Indians are married to members of the Tribes and reside within the Indian Country of the Tribes. Likewise, many nonmember Indians live in housing units provided by the tribes and/or work for the tribes or businesses located within the tribal jurisdictions. Each tribe has many social and cultural events each year which draw from hundreds to thousands of nonmember Indians to the Tribal jurisdiction.

A decision of this Honorable Court determining that Tribal criminal laws could not be enforced against non-member Indians in the Tribal Court would create immediate chaos in the area of law enforcement and tribal government, and change the status quo regarding authority over criminal offenses of non-member Indians all of whom are now tried in the tribal Courts. Such a result could cause the disintegration of the legal foundation for the control of social, cultural, religious, and economic activity within the tribal jurisdiction. In order for Tribal Law to be effective, it must be enforceable in the Tribal forums. Amicus Curiae have an essential and compelling interest in the maintenance of law and order within the jurisdiction of the Tribes, and the regulation by the Tribes of business and personal activities of persons within the jurisdiction of the Tribes in order to provide for and promote the peace, safety, and welfare of all persons who live, work, or otherwise enter into the tribal jurisdiction.

SUMMARY OF ARGUMENT

Indian tribes are distict political communities which have always exercised criminal jurisdiction over their members and Indians who are members of other tribes as a matter of inherent right. This right has been recognized by treaty, by the courts, and by the United States Attorney General. Congress has never taken this authority from the Tribes, and it is the prerogative of Congress to do so or to leave the status quo intact.

Finally, the Court should resist this invitation to engage in judicial activism, and return to the conservative

approach which is consistent with the historical treatment of Indian tribes. Such an approach requires that the authority of Indian tribes over non-member Indians in criminal cases be affirmed.

ARGUMENT

I. INDIAN TRIBES ARE SOVEREIGN ENTITIES ENTITLED TO EXERCISE THE AUTHORITY TO ADJUDICATE DISPUTES CONCERNING ALL PERSONS AND PROPERTY WITHIN THE INDIAN COUNTRY SUBJECT TO THEIR JURISDICTION.

While the term "Indian Country" has been used in many different senses, it has traditionally been defined as country within which Indian tribal laws, whether express legislative enactments or tribal law in the form of traditional usages and customs, i.e., tribal common law, and federal laws relating to Indians are generally applicable to the exclusion of state laws. F. Cohen, *Handbook of Federal Indian Law*, 5 (1942). Felix Cohen, the noted Indian law scholar previously recognized by this Court as the eminent authority in the field, *Squire v. Capoeman* 351 U.S. 1, 8-9 (1956), reviewed the historical development of the term Indian Country, *Id.* at pages 5 and 6:

> The Indian country at any particular time must be viewed with reference to the existing body of federal and tribal law. Until 1817, it is country within which the criminal laws of the United States are not generally applicable, so that crimes in the Indian Country by whites against whites, or by Indians, are not cognizable in state or federal courts any more than crimes committed on the soil of Canada or Mexico. Treaties defined the boundaries between the

> United States, or the separate states, and the territories of the various Indian tribes or nations. Within these territories the Indian tribes or nations had not only full jurisdiction over their own citizens, but the same jurisdiction over citizens of the United States that any other power might lawfully exercise over emigrants from the United States. Treaties between the United States and various tribes commonly stipulated that citizens of the United States within the territory of the Indian nations were subject to the laws of those nations.[1]

and further:

> Indian country in all these statutes [the original federal legislation defining the Indian country and extending certain aspects of federal law to certain persons or property therein] is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by the statute, and state law is not applicable at all. This conception of the Indian country reflects a

[1] Treaty of January 21, 1785, with Wiandot, Delaware, Chippewa, and Ottawa Nations, 7 Stat. 16; Treaty of November 28, 1785, with the Cherokees, 7 Stat. 18; Treaty of January 3, 1786, with the Choctaw Nation, 7 Stat. 21; Treaty of January 10, 1786, with the Chickasaw Nation, 7 Stat. 24; Treaty of January 31, 1786, with the Shawanoe Nation, 7 Stat. 26; Treaty of January 9, 1789, with the Wyandot, Delaware, Ottawa, Chippewa, Pattawattima, and Sac Nation, 7 Stat. 28; Treaty of August 7, 1790, with the Creek Nation, 7 Stat. 35; Treaty of July 2, 1791, with the Cherokee Nation, 7 Stat. 39; Treaty of August 3, 1795, with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wees's, Kickapoos, Piankashaws, and Kaskaskias, 7 Stat. 49.

> situation which finds its counterpart in international law in the case of newly acquired territories, where the laws of those territories continue in force until repealed or modified by the new sovereign.

It is, therefore, clear that the question of whether an Indian tribe has the authority to enforce its criminal laws against Indian suspects concerning alleged offenses arising within the Indian Country must be determined in light of this historical understanding, and the current federal policy of tribal self-determination and limitation of federal involvement in the affairs of the tribes.

The most basic principle of Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which have never been extinguished. The statutes of Congress then, must be examined to determine the express limitations placed upon tribal sovereignty rather than to determine its sources or positive content. Cohen, *Handbook of Federal Indian Law*, 122 (1942); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (inherent power to tax, regulate, and exclude non-indians); *United States v. Wheeler*, 435 U.S. 313, (1978) (power to exercise criminal jurisdiction over Indians); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (membership, and immunity from suit by reason of sovereign immunity); *Roff v. Burney*, 168 U.S. 218 (1897) (membership); *Jones v. Meehan*, 175 U.S. 1 (1899) (inheritance); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (power to exclude nonmembers).

Indian tribes, as distinct political communities retaining their original natural rights of self-government, remain a separate people with the power of regulating both their members and other persons or entities within their territory. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States v. Mazurie*, 419 U.S. 544 (1975); *United States v. Kagama*, 118 U.S. 375 (1886); *United States v. Wheeler*, 435 U.S. 313, (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); F. Cohen, *Handbook of Federal Indian Law*, 122-23 (1942).

The outgrowth of this historical and decisional perspective is the repeated determination that Indian tribes have the inherent authority to enforce their own laws in their own forums as to both Indians and non-Indians. *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

Within the Indian Country, the repeated litigation in this, and other courts, has clearly shown that Indian Tribes may regulate and adjudicate controversies arising out of the activities of Indians and non-Indians where the conduct of the non-Indian or non-member threatens or has a direct effect on the political integrity, economic security, or the health and welfare of the tribe. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544, 565-66 (1981); *Washington v. Confederated Tribes*, 447 U.S. 134, 153-55 (1980); *Williams v. Lee*, 358 U.S. 217 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Fisher v. District Court*, 424 U.S. 382 (1976); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) *appeal dism.* 203 U.S. 599 (1906); *Maxey v. Wright*, 34 S.W. 807 (Ct. App. Ind.

Terr.) *aff'd.* 105 F. 1003 (8th Cir. 1900); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980); *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982) *cert. den.* 459 U.S. 967 (1982); *Knight v. Shoshone and Arapaho Tribes*, 670 F.2d 900 (10th Cir. (1982); *Ortiz-Barraza v. United States*, 412 F.2d 1176, 1179 (9th Cir. 1975); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 963-64 (9th Cir. 1982); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

When considering whether any particular legislation imposes limitations upon the governing authority of Indian Tribes, that legislation or treaty must be liberally construed in the interest of the Tribe, and doubtful expressions resolved in its favor. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *McClanahan v. Arizona Tax Commission*, 411 U.S 164 (1973); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1916); *Choate v. Trapp*, 224 U.S. 665 (1912); *United States v. Celestine*, 215 U.S. 278 (1905); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

II. INDIAN TRIBES HAVE FULL AUTHORITY TO ENFORCE THEIR CRIMINAL LAWS AS TO OFFENSES COMMITTED BY INDIANS WITHIN THE INDIAN COUNTRY SUBJECT TO THEIR JURISDICTION.

> From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities," and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of the original tribal sovereignty.

F. Cohen, *Handbook of Federal Indian Law*, p. 122.

Petitioner asserts that Indian tribes do not have the authority to adjudicate in their Courts criminal cases arising within the Indian Country subject to the jurisdiction of the Tribe when the controversy includes as a defendant non-member Indians. Petitioner fails to recognize that when Congress has intended the result Petitioner urges – that the government of an Indian tribe be limited in its authority over persons or property within its territorial jurisdiction – it has explicitly so provided. *See*, Act of June 7, 1897, 30 Stat. 62, 84 (Five Civilized Tribes); Act of June 28, 1906, 34 Stat. 539, 545 (Osage Tribe); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303; Treaty of July 23, 1851, 10 Stat. 949, Article 5 (Proclamation, February 24, 1853) (introduction of liquor into the Indian country); Act of June 28, 1898, Ch. 517, 30 Stat. 495, Sections 1, 3, 26, 28 (Courts and laws affected).

It has been settled law for over a century that the Constitution of the United States does not apply to or limit the authority of Indian tribal governments, *Talton v.*

Mayes, 163 U.S. 376 (1876), and the subsequent case law supporting this black letter law is legion. Felix Cohen, *Handbook of Federal Indian Law*, 122 (1942) stated:

> Perhaps the most basic principle of all Indians law, supported by a host decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.

The traditional conservative view with respect to the powers of Indian Tribes with respect to the administration of justice within the Indian Country subject to the Tribe's jurisdiction is set out in Cohen, *Handbook of Federal Indian Law* 146 - 149 (1942 Ed.). The authority of a Tribe to punish violations of its law by Indians has been recognized in the decisions of this Court contemporaneous with the enactment of the Indian Major Crimes Act, 18 U.S.C. § 1153, *United States v. Kagama*, 118 U.S. 375 (1886), and by the United States Attorney General. In an 1883 opinion involving a Creek defendant who allegedly killed an Arapaho victim within the Potawatomi Reservation,

the Attorney General concluded that there was no federal jurisdiction over the alleged offense. 17 Op. A.G. 566, 570 (1883). See, also, *State v. McKenney*, 18 Nev. 182, 2 P. 171 (1883), *Anonymous*, 1 Fed. Cas. No. 447 (C.C.D.Mo. 1843).

Within this same time period, it is obvious that Congress knew how to provide for federal and/or state jurisdiction over criminal offenses involving members of two different tribes on the reservation of a third tribe or the reservation of the victim or perpetrator. Section 12 of the Act of May 2, 1890, 26 Stat. 81 (the Oklahoma Organic Act) expressly provided for limited jurisdiction in the courts of the Territory of Oklahoma in cases involving members of different Tribes as follows:

> That jurisdiction is hereby conferred upon the district courts in the Territory of Oklahoma over all controversies arising between members of citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Territory of Oklahoma, and any citizen or member of one tribe or nation who may commit any offense or crime in said Territory against the person or property of a citizen or member of another tribe or nation shall be subject to the same punishment in the Territory as he would be if both parties were citizens of the United States . . . .

Although other sections of that act limited the application of said section to those lands not within the jurisdiction of the Tribes, and said section was no longer of any force after the admission of Oklahoma as a state, it does show that Congress knew how to explicitly reach the result which Petitioner urges in this case. In other words, if Congress determines that nonmember Indians should be subject to either state or federal courts for their offenses

within the Indian Country of another tribe, or if Congress determines that Tribal Courts should no longer have the authority to try nonmember Indians, it knows exactly how to accomplish this result.

In fact, since the early 1800's, Congress has resisted providing for such intrusions into the exercise of tribal governmental authority.[2] Simply stated, both the Congress and this Court have consistently guarded the authority of Indian tribes over the Indian Country subject to their jurisdiction, and their power to govern persons and property therein. If this authority is to be taken from the tribes, it is for Congress alone to do it. The fact that Congress has not done so requires that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

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[2] *See*, Rep. Comm. Ind. Aff. 1833 p. 186 (Commissioner Herring); Rep. Comm. Ind. Aff. 1838 p. 424 (Commissioner Crawford); Extract from Report of the Secretary of the Interior, 1865, p. IV in Rep. Comm. Ind. Aff. 1865 (Interior Secretary Harlan); Rep. Comm. Ind. Aff. 1877 pp. 1-2 (Commissioner Hayt); Rep. Comm. Ind. Aff. 1886, p. XXVII (Commissioner Atkins); *See, also*, Rep. Comm. Ind. Aff. 1889, p. 26 (reporting the establishment of Courts of Indian Offenses in 1882 without the benefit of Congressional approval or authorization, even in light of the many previous requests for such authority), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 68-69 (1978), where this Court discusses another attempt by the Interior Department to obtain Congressional approval to review the governmental actions of Indian tribes – an attempt which was rejected by the Congress. The Indian Reorganization Act itself, 25 U.S.C. §§ 465 et seq., was designed not to limit the authority of traditionally based tribal governments, but to get the Secretary of the Interior out of tribal self-government into which he had

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III. THE GRANTING OF AMERICAN CITIZENSHIP TO INDIANS WAS NOT INTENDED BY CONGRESS TO LIMIT THE AUTHORITY OF INDIAN TRIBES WITH RESPECT TO NONMEMBER INDIANS OF OTHER TRIBES.

Prior to the original general Indian citizenship act, Act of June 2, 1924, Ch.233, Public Law No. 175 (H.R. 6355; Approved, June 2, 1924), United States citizenship had been granted only to certain classes of Indians. The question of Indian citizenship was resolved only by individual inquiry in which the facts of each particular case were controlling. In order to be classified as a citizen of the United States, an Indian person born within the United States was required to show that he or she was a citizen by virtue of either (1) treaty provisions allowing "naturalization" such as Articles 13, 17, and 28 of the treaty of February 23, 1867 with various bands or tribes of Indians (15 Stat. 513); (2) receipt of an allotment of land pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 388, prior to its 1906 amendment; (3) receipt of a patent in fee simple to an allotment after 1906 pursuant to the Act of May 8, 1906, 34 Stat. 182, amending the General Allotment Act; (4) abandoning his tribe and taking up the habits of "civilized" life pursuant to Section 6 of the General Allotment Act of 1887; (5) being a honorably discharged veteran of World War I pursuant to the

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intruded by his unwarranted assumption of administrative powers. Ziontiz, *After Martinez: Civil Rights Under Tribal Government*, 12 Univ. Calif. Davis L. Rev. 1, 31-33 (1979); Senate Comm. on Indian Affairs, Report No. 1080, 73rd Cong., 2nd Sess., 3-4 (1934); Hearings on S. 2755 and S. 3645, Senate Comm. on Indian Affairs, 73rd Cong., 2nd Sess., p. 2, p. 256 (1934); H.R. Rep. No. 1804, 73rd Cong., 2nd Sess., p. 8 (1934); *Morton v. Mancari*, 417 U.S. 535 (1974).

Act of November 6, 1919; (6) being an Indian woman married to a citizen of the United States after the Act of August 9, 1888, 25 Stat. 392; (7) being subject to special legislation such as the Act of March 3, 1901, 31 Stat. 1447, (extending citizenship to Indians in the Indian Territory) or the Act of March 3, 1921, 41 Stat. 1249-1250, (extending citizenship to Indians of the Osage Tribe in Oklahoma); or (8) being born to Indian parents who were citizens.

In House Report No. 222 to accompany H.R. 6355, 68th Congress, 1st. Session, (the precursor to 8 U.S.C. § 1401(a) (2)) the House Committee stated:

> At the present time it is very difficult for an Indian to obtain citizenship without either being allotted and getting a patent in fee simple, or leaving the reservation and taking up his residence apart from any tribe of Indians. This legislation will bridge the present gap and provide means whereby an Indian may be given citizenship without reference to the question of land tenure or the place of his residence, and your committee has unanimously recommended the enactment of this measure.

In its original form, this bill provided a process by which the Secretary of the Interior in his discretion issued a "certificate of citizenship" to noncitizen Indians born within the United States upon application. The Senate amended the bill to its final form, Senate Report No. 441, 68th Congress, 1st Sess., April 21, 1924 stating that "as [the Five Civilized Tribes and] a large number of other Indians had become citizens under various acts of Congress, it was only just and fair that all Indians be declared citizens."

The intended limited effect of this legislation, however, is shown by the remarks of Mr. Snyder, the sponsor of the bill in response to a question as to whether the bill would affect an Indian's right to vote in state elections:

> [I]t is not the intention of this law to have any effect upon the suffrage qualifications in any State. In other words, in the State of New Mexico, my understanding is that in order to vote a person must be a taxpayer, and it is in no way intended to affect any Indian in that country who would be unable to vote unless qualified under the State suffrage act. That is the understanding. And also it goes to this extent, it does not in any way change the right of the Indian to any tribal relation or any property he now holds. It does not affect that in any way but simply makes him an American citizen. . . .

1924 Cong. Rec. – House 9303, May 23, 1924, Remarks of Mr. Snyder. In other words, the grant of citizenship to all Indians, whether they requested it or not, did not grant Indians even the right to vote in state elections, and certainly was not intended to affect their relations with *any tribe*. To the contrary, the grant of citizenship was intended to make Indians American citizens without affecting "any tribal relation" and without requiring the Indian to take "up his residence apart from *any tribe* of Indians." There is simply no indication in the legislative history the grant of citizenship is intended to prevent the exercise of tribal criminal jurisdiction over Indian citizens of the United States simply because they are not a member of the Tribe within whose jurisdiction they allegedly committed an offense. Further, any tribal member may resign his legal and political status as an Indian simply by resigning his membership in an Indian tribe – thereby

becoming for all intents and purposes a non-Indian. Since petitioner did not do so, the judgment of the Ninth Circuit should be affirmed.

IV. THE COURT SHOULD RETURN TO THE CONCEPTUAL CLARITY OF JUSTICE MARSHALL'S DECISION IN *WORCESTER v. GEORGIA*.

In the early 1950's, Congress experimented with a policy of termination of the governmental relationship between the United States and the various Indian tribes through a series of termination acts, and a concurrent resolution expressing the desire of Congress to terminate the federal relationship with Indian people and subject them and their lands to state law. House Concurrent Resolution 108, 83rd Cong., 2d Sess. 2-4 (1954), since repealed. A major step toward implementation of the termination policy was the enactment of Public Law 83-280, Act of August 15, 1953, ch. 505, 67 Stat. 588 (Section 7 Repealed and reenacted as amended 25 U.S.C. §§ 1321-1326, 18 U.S.C. § 1162, 28 U.S.C. § 1360. [For a general discussion of these matters, *see*, Cohen's *Handbook of Federal Indian Law* (1982 ed.) 170-177.]

At the time of the propoundment of this policy, this Court began the drift away from its traditional conservative reliance upon the inherent sovereignty of Indian tribes as the basis for precluding state action and affirming tribal authority over all persons within the Indian Country subject to tribal jurisdiction. This drift began in *Williams v. Lee*, 358 U.S. 217 (1959), wherein the Court propounded the "infringement test" stating "Essentially, absent governing Acts of Congress, the question has

always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." This drift escalated in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) wherein the Court acknowledged that it had in some ways departed from the conceptual clarity of Justice Marshall's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and reached its zenith in *Montana v. United States*, 450 U.S. 544 (1981) and *Cotton Petroleum Corp. v. New Mexico*, ___ U.S. ___ , 109 S.Ct. 1698 (1989). In short, a recent line of dicta in cases such as *Williams*, *McClanahan*, and *United States v. Wheeler* have ripened into a limited line of holdings restricting tribal authority and expanding state authority over non-Indians in Indian Country, without benefit of federal statutory sanction, as outgrowths of the since repealed liberal termination policy of the 1950's. This judicial activism has resulted in a quagmire of "balancing tests" and "flexible rules" which appear to be in line with neither traditional Supreme Court holdings, general federal statutes, the Constitution, nor the current policies of the Congress or the Executive branch of the Federal Government. *See*, "State Power Over Indian Reservations: A Critical Comment On Burger Court Doctrine," 26 South Dakota Law Review 434 (Summer 1981).

Simply stated, these recent decisions each have one element in common. They each tend to limit traditional conservative notions of the sovereign powers of Indian tribal government in favor of increased governmental authority by the states without benefit of Congressional sanction, and in direct conflict with the federal statutes

providing for the extension of state jurisdiction to persons and property within the Indian Country. This liberal attempt to redefine, after two hundred years, the relationship between the three active competitors for authority – the federal, tribal, and state governments – has resulted in a flood of unnecessary litigation and a series of attacks upon the very foundation of tribal governments recognized by the political departments of the United States since the founding days of the Republic.

Aside from the problems incurred in attempting to square these decisions with two hundred years of case law, the intent of the framers of the Constitution, and traditional notions of Indian sovereignty, these decisions ignore the effect of several federal statutes of general application which preempt state authority within Indian Country leaving such authority to be exercised by the Tribe, and the current policies of Congress. When the seminal case leading to this line of decisions, *Williams v. Lee*, was decided, the "infringement test" was completely unnecessary, state action being preempted by federal treaty, Navajo Treaty of 1868, 15 Stat. 667, and Statute, 28 U.S.C. § 1360, 18 U.S.C. § 1151. See, *Kennerly v. District Court*, 400 U.S. 424 (1971).

Congress in 18 U.S.C. § 1151 determined that Indian Country – the area within which tribal and federal law operated to the exclusion of the States – would include all Indian reservations notwithstanding the issuance of any patent, all Indian allotments, and dependant Indian communities. All tracts within Indian Reservations, whether patented to an Indian or a non-Indian, are declared by

Congress to remain Indian Country, and subject to exclusive tribal and federal jurisdiction until Congress otherwise determines. *Seymour v. Superintendent*, 368 U.S. 351 (1962); *United States v. Celestine*, 215 U.S. 278 (1909).

Under its Commerce Clause authority, Congress has amended Public Law 83-280 at 18 U.S.C. § 1162 to read in pertinent part as follows:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:. . . .
>
> (c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

and further, at 25 U.S.C. § 1321:

> (a) The consent of the United States if hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any

> such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

These statutes obviate the need for the "infringement test" or "balancing test" analysis in that they are governing acts of Congress specifically specifying the methods by which state law can be made applicable to criminal cases committed by or against Indians within the Indian Country within the boundaries of that State, and in the absence of compliance therewith state law is generally preempted. *McClanahan, supra, Kennerly v. District Court,* 440 U.S. 423 (1971). This case involves an Indian, Congress had determined the extent to which State instead of tribal authority will prevail within the Indian Country – including fee patented lands – in such a fashion that when an Indian is one of the parties in the case it is a matter for the application of tribal law to the exclusion of the state absent compliance with 18 U.S.C. § 1162 and 25 U.S.C. § 1321. When Congress has made such a determination, Courts are not free to review state or tribal action under the dormant Commerce Clause. Courts are final arbiters only when Congress has not acted. Here Congress has struck the balance it deems appropriate, and the Court should continue to allow the Tribe to exercise full authority over all Indians in the Indian Country and criminal offenses therein until and unless the State and the Tribe comply with the statutory formula for the transfer of jurisdiction.

Finally, both the Congress and the executive branch have repudiated the termination theory upon which this line of decisions is founded, and have returned to the

traditional conservative notions of tribal sovereignty and independence from state involvement within the Indian Country subject to the tribe's jurisdiction. *See,* Indian Self Determination Act, 25 U.S.C. §§ 450 et seq.; 1968 Indian Civil Rights Act, 25 U.S.C. §§ 1322, 1326 (requiring tribal consent prior to any state assuming civil jurisdiction over that tribe's Indian Country); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq. (providing for exclusive tribal authority over Indian child custody actions when the Indian child is a resident or domiciled within the Indian Country and the removal of such actions from state to tribal courts whether or not either of the parents are non-Indian when the child is not within the Indian Country); 25 U.S.C. §§ 2101 et seq. (providing for increased tribal control of mineral development); 25 U.S.C. §§ 2201 et seq. (providing for consolidation of fractionated heirship land in the Tribes); 25 U.S.C. §§ 711 et seq., 712 et seq., 761 et seq., 861 et seq., 903 et seq., (reinstating Tribes terminated pursuant to the termination policy of Congress in the early 1950's – the policy which underlies *Montana, Oliphant,* and the dicta in the other decisions cited above); and 26 U.S.C. §§ 7871 (treating Indian Tribes as States for the purpose of taxation).

It is clearly the will of Congress and the Executive Branch *see,* President Reagan's Indian Policy Statement, that Indian Tribes exercise a broad range of authority over all persons and property within the Indian Country jurisdiction of the Tribe. The court should not violate the will of Congress in such matters, *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985), should not strain to implement a policy which Congress has rejected,

Bryan v. Itasca County, 426 U.S. 373, 388 (1976), and should return to the conceptual clarity of Justice Marshall by determining that, in regard to tribal authority, "What is not expressly limited [by specific Act of Congress] remains within the domain of tribal sovereignty." Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.).

CONCLUSION

There is no doubt in this case that the general authority of Indian Tribes include the authority to adjudicate criminal cases arising within the Indian Country subject to their jurisdiction when an Indian is the defendant. For these reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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